

[*Day v. Georgia Power Co.*](#) 88-ERA-42 (ALJ June 23, 1989)

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U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

DATE: June 23, 1989
CASE NO. 88-ERA-42

IN THE MATTER OF

ROGERS DAY
Complainant

v.

GEORGIA POWER COMPANY
Respondent

Chavene King, Jr., Esq.
For the Complainant

Jesse P. Schaudies, Jr., Esq.
Steven J. Whitehead, Esq.
For the Respondent

BEFORE: C. RICHARD AVERY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding under the Energy Reorganization Act of 1974, as amended (Act), 42 U.S.C. 5851 (1982), and its implementing regulations, 29 C.F.R. Part 24. The Act in 5851(a) prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or otherwise discriminating against an employee who has engaged in protected activities as set forth in the Act.

In this instance Rogers Day (Complainant) filed a complaint against Georgia Power Company (Respondent) alleging discrimination and discharge as a result of quality concerns, Equal Employment Opportunity Commission and NRC deficiencies and complaints. On September 14, 1988, following an investigation, the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, concluded that Complainant had not been discriminated against but rather had been terminated as a result of absenteeism and overall job performance. This decision was appealed by the Complainant.

A formal hearing was held in Albany, Georgia, on January 23 and 24, 1989, at which time the parties were afforded full opportunity to present evidence and argument. The findings and conclusions in this decision are based upon my observation of the witnesses who testified, upon an analysis of the entire record, arguments of the parties (only the Respondent chose to file a post-hearing brief), applicable regulations, statutes and case law precedent. By agreement of the parties, the time constraints applicable in this case were waived.¹

Exhibits and Stipulations

The exhibits in this case consist of five Administrative Law Judge's exhibits, 14 Complainant's exhibits and 13 Respondent's exhibits. At the outset of the hearing, the parties agreed that (1) the Respondent is subject to the Act; (2) the Complainant was an employee under the jurisdiction of the Act; and (3) the Complainant suffered an adverse action with respect to his compensation, terms and conditions and/or privilege of employment in that his job was terminated (Tr. 7, 8).

Issues

The following are the unresolved issues in this matter (Tr. 7, 8 and 695):

1. Timeliness of Complainant's complaints;
2. Whether the Complainant engaged in protected activity under the Act;
3. Whether the Respondent knew or had knowledge that Complainant engaged in protected activity; and

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4. Whether the action taken against the Complainant (termination) was motivated, at least in part, by Complainant's engagement in protected activity.

Findings of Fact

1. The Respondent is a utility company engaged in the generation and distribution of electric power.

2. The Complainant applied for employment at Respondent's Plant Vogtle on October 25, 1987, and in doing so failed to reveal on his employment application that he had previously been discharged from employment with the Respondent in 1979 for excessive absenteeism.

3. The Complainant was hired as a utility man in the Building and Grounds Department at Plant Vogtle and began work on November 23, 1987. A utility man is an entry level position responsible for cleaning and maintaining the area.

4. The Complainant was given orientation information including safety procedures and by his signature acknowledged that he understood the materials. He was also furnished a quality concern package of information which outlined the fact that employees are told how and in what manner safety and operation concerns can be raised. These concerns can be raised anonymously and the employees supervisors are not involved nor are they informed about the concerns raised.

5. On December 19, 1987, the Building and Grounds Department took over from the general contractor who had built the facility, the Fire Watch Program. This program involved personal inspections by employees on an hourly basis of designated sections of the plant to physically inspect whether there was an increase in heat, smoke or any signs of fire. This program was in addition, of course, to the mechanical and computerized safety devices which were also in place. The employees of Buildings and Grounds were given a choice whether they wished to work maintenance or to do fire watch. The Complainant chose fire watch duties.

6. In the short interval that followed the Complainant's assignment to the Fire Watch Program and prior to his being terminated on January 19, 1988, Complainant missed three full

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days at work, all but 15 minutes of a fourth day and was late on a fifth day.

7. As a new employee Complainant was considered to be on "trial" for six months and the Respondent could, at its option transfer, lay off or dismiss a "trial" employee (Respondent's Exhibit 5).

8. The Complainant was terminated on January 15, 1988, for absenteeism and not for any protected behavior under the Act.

9. The Complainant failed to file a timely complaint under the Act.

Timeliness

The first issue to be considered is that of the timeliness of the Complainant's complaint following his termination. This was not initially an issue in the case, but was raised by the Respondent at the conclusion of the Complainant's presentation of evidence (Tr. 267). I allowed the Complainant to offer additional evidence at that time, and after discussion I eventually declined to rule on the issue from the bench (Tr. 298).

29 C.F.R. 24.3(b) provides that "any complaint shall be filed within 30 days after the occurrence of the alleged violation." Section 24.3(c) requires that the complaint be in writing.

At the hearing, the Complainant testified that on the day following his termination, January 16, 1988, he was instructed by the NRC to report the incident to the Department of Labor office within 30 days (Tr. 277, 278). Complainant identified Complainant's exhibit 11 as the letter he received from the NRC following that conversation (Tr. 278). After receipt of Exhibit 11, Complainant testified that he "sat back" and waited seven months, though he did attempt to call the Department of Labor on "a countless number of times." (Tr. 279). He also testified that on January 26, 1988, he discussed the matter with a Mr. Young at the Department of Labor who told him it was a waste of the tax payers money (Tr. 280). He stated that he then called the NRC again and talked with a Mr. DeMiranda and based on that conversation he sent two certified letters one to the NRC and the other to the Department of Labor (Tr. 281). He identified the return receipt (Complainant's exhibit 12) signed by Mr. DeMiranda and

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dated February 9, 1988, as the one which he mailed to the NRC (Tr. 284), and he identified the undated return receipt (Complainant's exhibit 13) as the one he mailed to the Department of Labor (Tr. 285). He testified he sent both letters on the same day, around January 26, 1988, that it was within 30 days of his termination and that he set forth the facts that constituted his complaint, but he did not have a copy of the letter (Tr. 284, 285, 286). Later in August, Complainant testified he called Washington, Atlanta and Savannah and was assured a quick response would be forthcoming and he was given an apology that Mr. Young had not responded to his complaint (Tr. 288).

It has been held that the statutory period for filing a complaint is not jurisdictional, but rather a statute of limitations which is subject to waiver, estoppel and equitable tolling and that raising the precise claim in the wrong government forum may even toll the time period. However, based on the facts presented to me in this instance, I find that the Complainant's claim with the Department of Labor was untimely filed and that in view of the clear written language contained in Complainant's exhibit 11, that he can offer no excuse for his tardiness sufficient to warrant a waiver or tolling of the time requirement of 30 days as set out in 29 C.F.R. 24.3(b). In sum, I find the Complainant failed to carry

his burden of proving he filed a written complaint within the time period prescribed by law. His claim is barred by the statute of limitation.

Although the Complainant maintained at the hearing that he filed something with the Department of Labor within 30 days of his termination, there is no documentary evidence to substantiate his allegations. The September 14, 1988, letter from the Employment Standards Administration, Wage and Hour Division, Department of Labor, clearly states that "your complaint was received on March 3, 1988." (ALJ Exhibit 1). The only physical evidence the Complainant offers to prove an earlier filing date is an undated return receipt (Tr. 13) which he states was mailed at the same time he mailed the materials to NRC and in response to which he received the returned receipt identified as Complainant's exhibit 12. However, to accept this as true you first would have to accept Complainant's testimony as entirely accurate and secondly you would have to believe that though mailed on January 26, 1988, it took until March 3, 1988, for the complaint to be received. I am unwilling to do this.

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Throughout the trial Complainant demonstrated a tendency to either embellish the facts about which he testified and/or confused details. The Complainant went to great lengths to explain that he was not allowed to make an erroneous entry (line item) on his fire watch sheet, but yet everyone else who testified about the subject said without fail that it was quite permissible so long as the mistake was lined out and initialed and dated. Complainant was not truthful on his employment application concerning prior dismissals. Despite testimony to the contrary, he alleged that he most frequently was assigned the most difficult fire watch post. He confused the use of the line item sheet. He demanded seniority despite the union contract to the contrary. For these and other inconsistencies which occurred throughout the hearing, I am not trustful of the Complainant's memory as regards undocumented events. Rather, I prefer to rely on the documentary evidence for clues and in doing so find that while there was timely correspondence to the NRC, there is no evidence that there was a timely filing with the Department of Labor. Neither do I find the filing with NRC to be sufficient to toll the statute because as evidenced by Complainant's exhibit 11, the Complainant was specifically instructed that he must take action with the Department of Labor. Also, while I realize that the mailing of the complaint and not the receipt of the complaint is the test of timeliness, I find that the acknowledgment of a March 3, 1988, receipt date by the Department of Labor in Complainant's exhibit 11 is further indication that nothing was mailed to the Department of Labor by certified mail as early as January 26, 1989.

Other Issues

In a case such as this, the burden is on the Complainant to prove by a preponderance of the evidence that retaliation for protected activity was a motivating factor in his termination. The matter of timeliness notwithstanding, in this instance based upon a

thorough review of the record, I conclude that the Complainant has failed to establish a *prima facie* case of discrimination or retaliation within the meaning of the Act.

The requirements for establishing a *prima facie* case are that (1) the Complainant engaged in protected conduct; (2) the Respondent was aware of such conduct; and (3) the Respondent took some action adverse to the Complainant which was more likely than not the result of the protected conduct. Because I find the Complainant has failed in his burden to raise even an inference

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that protected activity was the likely reason for his termination (Item 3) I find no need to explore Items 1 and 2.

The Complainant was employed as a "trial" employee on November 23, 1987, and during the first six months of employment was subject to dismissal at the discretion of the Employer (Respondent's exhibit 5). From the time of his employment until the date of his termination, the Complainant was obviously a difficult employee who had excessive absenteeism, confused instructions, was on occasion insubordinate, and remained steadfast in his belief that he was entitled to greater seniority than had been bestowed upon him. The termination which occurred on January 15, 1988, smacks of nothing more than, in the words of the Department of Labor's investigative report; "the result of absenteeism and overall job performance . . ." (Complainant's exhibit 11). I find no indication from the record that there was a dual motive in the termination.

As demonstrated by Complainant's exhibit 2 and testified to by Elijah Dixon, superintendent of buildings and grounds, the Complainant was late or absent on five occasions from January 2 until January 14, 1988 (Complainant's exhibit 2). W. C. Lyons, quality concerns coordinator, undertook a sampling of 37 other employees and found Complainant's absenteeism to be the worst. Additionally, there was testimony of the Complainant's sleeping in the cafeteria after hours and refusing to shovel ice or vacuum when instructed to do so by a building and grounds foreman. Also, the Complainant showed confusion throughout his testimony that convinced me he really did not understand the instructions he was to follow concerning fire watch. The testimony from other witnesses was clear that a fire watch route sheet was furnished to each shift, but it was only a check list and it was the individual's responsibility to determine the correctness of the identification of areas to be inspected by referral to a map. Despite everyone else's understanding of this procedure, Complainant did not seem to comprehend and in response to a question I asked about the route sheet (Complainant's exhibit 10) stated that if it was wrong "the whole thing is wrong regardless of what the map says." (Tr. 261)

Mr. Dixon testified that with a union representative present (Richard Hill) he called Complainant into his office for a lengthy meeting on January 4, 1988, and went over his seniority concerns as well as general procedures with him. That same day,

Jones Gresham, buildings and grounds utility man, discovered two errors on the Complainant's line item sheet, and he too met with the Complainant. That night the Complainant went to the wrong level and stayed beyond hours on the mistaken belief that he (1) needed to wait on relief and (2) could not use the telephone. He was discovered by a security guard. On January 5, 1988, another meeting was called by Mr. Dixon to clarify the events of the previous evening, but the Complainant refused to have Mr. Hill as his union representative and another was furnished him. The meeting lasted two hours and nothing was really resolved with the Complainant. On January 9, 1988, Complainant was assigned to buildings and grounds and refused to follow instructions concerning task assignments. On January 14, 1988, Complainant was absent from work and when he came in on January 15, 1988, he was terminated by Mr. Dixon for excessive absenteeism. Mr. Dixon testified in terminating the Complainant he did not know whether he went to quality concern or NRC and that whether he did or did not had no affect over his decision to discharge the Complainant. Mr. Hill, the union steward, testified that he did not think the Complainant was singled out and also testified that he never saw a worse record and that he believed that termination was warranted.

Not only does the evidence utterly fail to prove termination because of protected behavior on the part of the Complainant, it is obvious from the Complainant's own testimony that what he believes to be the reason for his termination was concern over his entitlement to greater seniority. Those who testified about the subject, including Mr. Hill the union steward, stated that under the terms of the union contract the Complainant had no seniority because he was previously fired. Despite this, however, the Complainant clearly revealed his thoughts on the matter when he testified on cross examination that he had been gotten "rid of" because they feared his "super seniority." (Tr. 221-224). His belief was reiterated in response to my questioning (Tr. 263).

Conclusion

Regardless of the issue of timeliness and regardless of whether the Fire Watch Program was even an activity covered under the Act (several witnesses including Mr. Lyons, the Quality Concerns Coordinator, testified it was not a NRC safety requirement for plant operation), the record reveals to my satisfaction

that the Complainant was terminated for absenteeism. Apparently, it is the Complainant's belief that the Respondent was motivated out of fear of his "super seniority." In either event, the record supports a finding that it was not in retaliation for a protected activity.

Recommended Decision

I recommend to the Secretary of Labor the complaint herein be dismissed.

C. RICHARD AVERY
Administrative Law Judge

Dated: Jun 23 1989
Metairie, Louisiana

[ENDNOTES]

¹This matter was initially set for trial October 20, 1988. By telegram dated October 13, 1988, complainant requested a continuance and waived any time requirements set out by law. The case was reset for November 30, 1988, and again a continuance was requested. The matter was finally heard in January, 1989, and at the conclusion of that hearing the parties agreed that the time requirements of 29 C.F.R. 24.6(a) would be expanded so that the parties would have 45 days from receipt of the transcript to file post-hearing briefs and I would have an additional 45 days following receipt of the briefs for issuance of a Recommended Decision. By Joint motion filed April 14, 1989, the parties agreed to waive the time requirements of 29 C.F.R. 24 and consented to an extension of time for post-hearing briefs until May 15, 1989. Thereafter, because of an apparent confusion, the date for submission of briefs was once more extended until May 31, 1989, at which time the Respondent filed its brief. No post-hearing brief has been received from Complainant.